Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

September 2007

Refusal to accept insurer's lawyer does not entitle insured to recover its fees. Lazy Acres Market, Inc. refused to accept the lawyer assigned to defend it in a tort action because it believed the lawyer had a conflict of interest as she was also defending another defendant in the same suit. Lazy Acres hired its own lawyer. After the insurer settled the case, it sued the attorney with the alleged conflict for fees incurred in its defense by its own lawyer. Case dismissed. Plaintiff was unable to show that the outcome would have been any different if they had accepted the lawyer selected by the insurer. *Lazy Acres Market, Inc. v. Tseng* (Cal. App. Second Dist., Div. 6; July 3, 2007) 152 Cal.App.4th 1431, [2007 DJDAR 10175].

Sovereign immunity trumps attorney lien. Dun & Black performed legal services for Environmental Reclamation, Inc. in a contract dispute. After the case settled, the law firm asserted a lien for fees earned. But the IRS claimed the funds because Environmental Reclamation owed back taxes in excess of the settlement amount. Dun & Black sued the United States, claiming its lien had priority. The Ninth Circuit ordered the case dismissed. Absent an express waiver of sovereign immunity the court lacked subject matter jurisdiction. *Dunn & Black v. United States* (9th Circ.; July 11, 2007) (Case No. 05-35766) [2007 DJDAR 10609].

Genuine dispute doctrine may preclude bad faith claim. Under the "genuine dispute doctrine" an insurer may not be liable for bad faith if its denial of a claim is based on a persuasive rationale, whether ultimately correct or not. (*See, Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205, [10 Cal. Rptr. 2d 352]; *see also, Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949, [43 Cal.Rptr.3d 468]). But there are many unanswered questions as to the scope of the doctrine some of which may be resolved in a case now pending before the California Supreme Court in *Wilson v. 21st Century Insurance Co.* (*Rev. Granted*; April 26, 2007) (Case No. S141790). For an excellent analysis of the cases that have dealt with the doctrine *see*, Heeseman "*Genuine Dispute*," *Los Angeles Daily Journal*, July 13, 2007, page 7.

Fired lawyer entitled to fees. The law firm of Mardirossian & Associates agreed to represent plaintiff in return for a 50% contingent fee. Nine days before the case settled for $3.7 million, plaintiff fired the law firm and substituted his wife in as attorney of record. Plaintiff disputed the law firm's entitlement to fees. The trial court disagreed and the Court of Appeal affirmed. Even though the law firm was not entitled to its contingent fee, it was entitled to recover the reasonable value of services rendered under the doctrine of quantum meruit. Unfortunately for Mardirossian *et al.*, the jury fixed the value of the services at only $645,440. *Mardirossian & Associates, Inc. v. Ersoff* (Cal. App. Second Dist., Div. 7; June 18, 2007) (*ord. pub.* July 13, 2007) 153 Cal.App.4th 257, [2007 DJDAR 10777].

Note: Quantum meruit is an equitable cause of action. (*See, McIntosh v. Mills* (2004) 121 Cal.App.4th 333, 348, fn. 16. [17 Cal.Rptr.3d 66, 77, fn. 16]). It is thus surprising that the case was tried to a jury. Although the court may employ an advisory jury in cases in equity, that does not seem to have been the case here.

Prospective release from liability does not encompass liability for gross negligence. Most gyms, camps, and other suppliers of recreational facilities require the execution of an agreement to relieve them from liability for their own negligence. Generally such agreements are enforceable. But the California Supreme Court has now held that it would be a violation of public policy to extend such contractual immunity to a defendant who has been grossly negligent. *City of Santa Barbara v. Sup.Ct. (Janeway)* (Cal.Supr.Ct.; July 16, 2007) 41 Cal.4th 747, [2007 DJDAR 10807].

New statute limits right of construction contractors to be indemnified by subcontractors. SB 138 (Calderon) was signed into law (Stats 2007, ch. 32). It provides that, effective January 1, 2008, residential construction contracts that indemnify the general contractor will be unenforceable. But the statute does not limit the duty of a subcontractor's insur-

The Litigation Section at The State Bar of California

80th Annual Meeting

September 27-30, 2007

In Anaheim

We invite you to attend

The Litigation Section Reception

Saturday, September 29, 2007

5:30 pm – 7:00 pm

Platinum Room, Anaheim Marriott Hotel

Open to all State Bar Annual Meeting registrants and guests

Meet and network with friends and colleagues

Hosted hors d'oeuvres and wine

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er to defend the general contractor; it specifies that it does not affect the duties of insurers as delineated in *Presley Homes, Inc. v. American States Insurance Company* (2001) 90 Cal.App.4th 571, [108 Cal. Rptr. 2d 686].

ABA Journal reports discov program. In its e-report of July 13, 2007, the ABA Journal notes "Vista—Microsoft's latest operating system—may prove to be most appropriately named, especially for those seeking evidence of how a computer was used…. [F]rom a litigator's perspective, the interesting point is that it keeps a lot more information—and more detailed information—about what a person does with a PC. This means lawyers can potentially discover more forensic evidence about what is on a computer and construct more detailed time lines about what was done with that information."

The saga of California's kangaroos continues. In earlier editions of this newsletter we reported on the plight of California's wild kangaroo population. In *Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (Cal. App. First Dist.; November 21, 2005) 134 Cal.App.4th 133, [36 Cal.Rptr.3d 19, 2005 DJDAR 13495], the Court of Appeal invalidated a California statute prohibiting the use of wild kangaroo body parts on the basis that the statute was preempted by federal law and a treaty between the U.S. and Australia. Adidas uses kangaroo skins for athletic shoes. [Apparently the kangaroo's ability to leap over high fences somehow enables the wearer of these shoes to do the same.]

To the delight of our state's many kangaroo lovers, the California Supreme Court granted review. That court has now issued its decision reversing the decision of the Court of Appeal, holding that the statute is valid and there is no federal preemption. *Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (Ca.Supr.Ct.; July 23, 2007) (Case No. S140064) [2007 DJDAR 11115]. Kangaroos are still safe in California; at least until Adidas takes the any kangaroo in California is now entitled to asylum. We will keep you posted.

Plaintiff-contractor's unlicensed status does not require affirmative defense. Where a contractor alleges in the complaint that it is properly licensed, a general denial in the answer places the matter in issue. Defendant need not assert absence of license as an affirmative defense. *Advantec Group, Inc. v. Edwin's Plumbing Co., Inc.* (Cal. App. Second Dist., Div. 4; July 23, 2007) (Case No. B191812) [2007 DJDAR 11201].

Statute of limitations for plaintiffs know they have been wrongfully convicted. After Rose's criminal conviction was set aside ten years after he was incarcerated, he sued the lawyer who had been appointed to represent him in the criminal case for malpractice. Too late. The statute of limitations starts to run, subject to tolling, when the malpractice is committed. This happened more than ten years earlier. The court noted that as outlined in *Coscia v. McKenna & Cueno* (2001) 25 Cal.4th 1194, [25 P.3d 670; 108 Cal.Rptr.2d 471], plaintiff should have filed his malpractice action and then have sought to stay those proceedings until he was legally exonerated. *Rose v. Hudson* (Cal. App. Third Dist.; July 24, 2007) (Case No. C052537) [2007 DJDAR 11213].